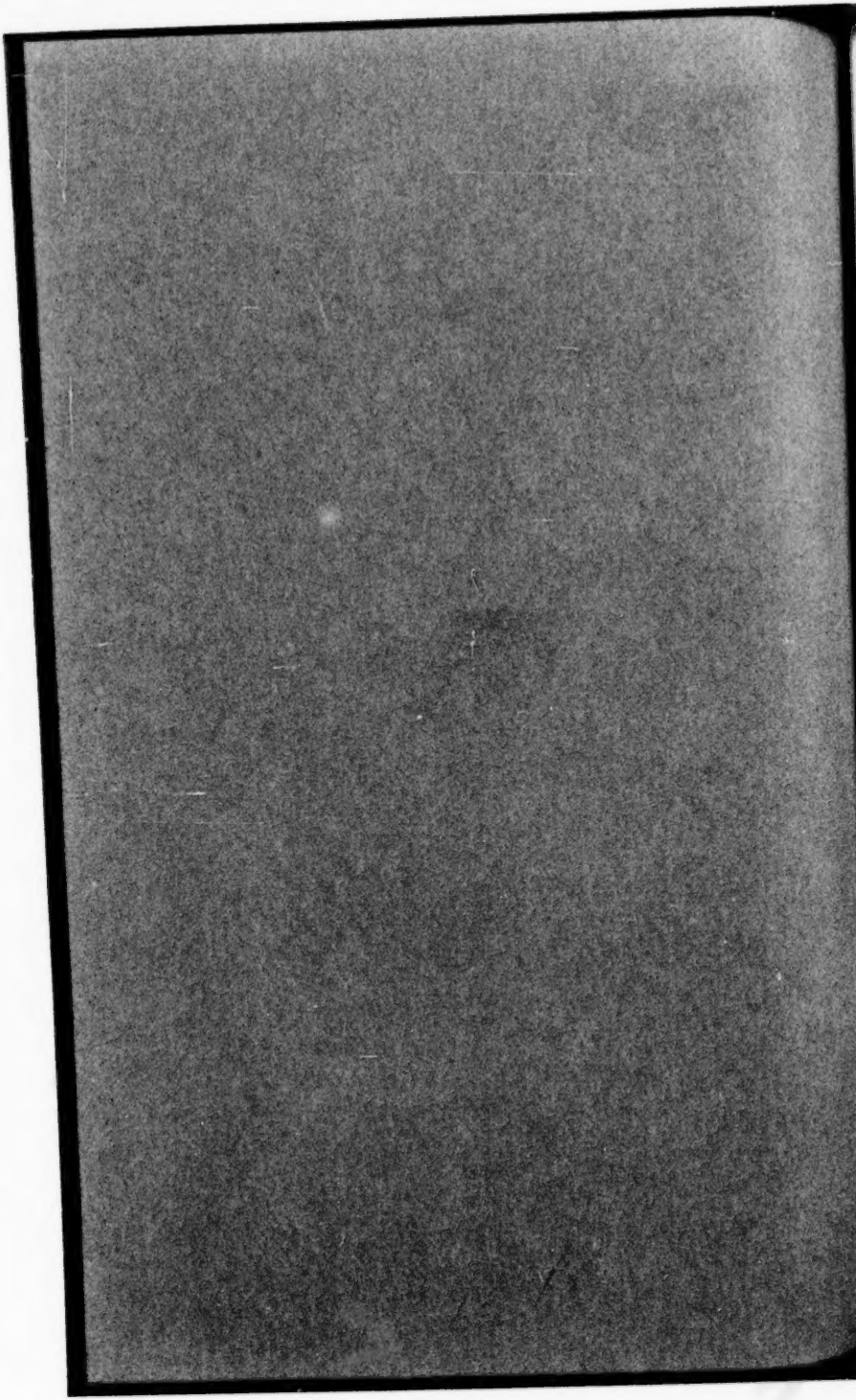

Supreme Court of the United States.

No. 33.—October Term, 1905.

Peoria Gas and Electric Company, Appellant, *vs.* The City of Peoria, Appellee. } Appeal from the Circuit Court of the United States for the Northern District of Illinois.

[January 2, 1906.]

This was a bill filed in the Circuit Court of the United States for the Northern District of Illinois by the Peoria Gas and Electric Company to restrain the enforcement of an ordinance passed by the defendant, fixing the price of gas. A decree was entered in the Circuit Court dismissing the bill, and the case was brought directly here, as involving a constitutional question.

The facts are these: Prior to 1899 for a period of many years the Peoria Gaslight and Coke Company had manufactured and furnished gas to the city of Peoria and its citizens. The business had been profitable and the stock was valuable. In 1899 the plaintiff company was organized to construct gas works in Peoria, and that city, by ordinance, granted to it a franchise permitting it to construct and operate a gas plant and lay mains along certain streets, etc. It is charged that in order to obtain this franchise the promoters of the plaintiff company represented that it was to be a Peoria company and enterprise, and that it would furnish gas at a cheaper rate than the old company; that in fact it was a scheme of certain Chicago capitalists, who, as soon as the ordinance was passed and the plant constructed, appeared as owners of substantially the entire stock. After the new company was organized and its plant constructed the two companies became competitors, the competition being so sharp that in the early summer of 1900 the new company lowered its price to 30 cents per thousand cubic feet for both light and fuel gas. On July 31, 1900, after a conference between the managers of the two companies, both raised the rate to $1.15 net for light and 75 cents net for fuel gas, to take effect August 1, 1900. The announcements of this raise in the rates were published in the Peoria papers on the same day, each announcement being in precisely the same language. On September 4, 1900, the city passed an ordinance providing that the maximum price for gas should be 75 cents per thousand cubic feet, and that the gas to be furnished should not be less than eighteen candle power.

of society, and may be termed the 'law of overruling necessity.'"

In the case of *Gundling* v. *City of Chicago*, 176 Ill., 340, the court said, again construing the power conferred upon cities and villages under Paragraph 66 of Section 1, Article 5 of the City and Village Act, and said, page 348:

> "The regulation of the police power is hardly susceptible of exact definition, as the exigencies of each case are varying, and the cases are innumerable where the health of the inhabitants of the municipality may be in some degree endangered. When the city council considers some occupation or thing dangerous to the health of the community, and in the exercise of its discretion passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation, as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other."

Again in *Culver* v. *City of Streator*, 130 Ill., 238, the court thus defined the police power of the state:

> "That power may be defined in general terms as comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public."

Again in *Wice* v. *C. & N. W. Ry. Co.*, 193 Ill., 351-53, the police power conferred upon cities and villages by Subdivision 66 of Section 1 of Article V of the City and Village Act was thus defined:

> "The provision of the general incorporation act is a delegation by the general assembly to the City of Chicago of police powers to pass and enforce all

necessary police ordinances—that is ordinances necessary for the comfort, safety, health, convenience, good order and welfare of its inhabitants."

It is difficult to conceive how powers more comprehensive could have been conferred upon a municipality than the ones embraced within the interpretation of Subdivision 66, *supra*, by the Supreme Court of Illinois in the case last quoted from.

We have quoted at great length from the decisions of the Supreme Court of Illinois, construing Subdivision Sixty-sixth of Section 1, Article V, for the purpose of showing that the powers conferred upon cities and villages by the legislature, as construed by the Supreme Court of Illinois, is wide, comprehensive and all prevailing. As this statute has been construed by the Supreme Court of Illinois, it intended to confer upon the municipality all the police power that the state itself might rightfully have conferred upon the municipality with reference to regulating the safety and welfare of the inhabitants within its borders.

Much is said by counsel for Mills about the derivative police powers of a municipality. It is true that the police power of the municipality is "derivative," but if by that language it is meant to imply that it is insignificant or unimportant, the contention is unfounded. The power of Congress is strictly derivative. Congress can exercise no power except that which in express terms or by necessary implication was conferred upon it by the Federal Constitution. Even the state legislature itself is in the exercise of derivative governmental powers. Under our theory of government, all governmental powers reside in the people and can only be exercised by any form of government, federal, state or municipal, except in so far as

governmental powers have been delegated to those respective bodies by the people.

There is no reason in law or in theory why the powers conferred upon municipalities should be construed in any other way, or subjected to any other test than are the powers conferred upon other departments of our government. Powers as important for the preservation of life, liberty and property as any ever exercised by either the state or federal government, are constantly administered by the cities and villages within the United States. The comfort, safety and welfare of millions of our inhabitants are ever dependent upon the proper exercise by municipal corporations of the functions that have been delegated to them by the state. The same broad and comprehensive rule of construction that was adopted by Justice Marshall in the celebrated case of *Gibbons* v. *Ogden*, 9 Wheaton, 1, in construing the implied powers of Congress over interstate commerce under the federal government should be adopted by our courts in construing the police powers delegated to municipal corporations.

It was fortunate, indeed, that a man possessing the pre-eminent wisdom and the matchless logic of Justice Marshall was called upon to lay down the landmark of the law in reference to the implied powers of Congress to regulate interstate commerce. Had that task devolved upon some modern judge, imbued with technical notions and narrow ideas in reference to the construction of governmental powers, it is possible that the most important power of the federal government over interstate commerce might by construction have been frittered away and the entire destinies of the nation changed.

We have already observed that under the decisions of the Supreme Court of Illinois, cities and villages are in-

vested with all the police power of the state that is necessary for the preservation of the public health, the public welfare and the public morals, so far as those powers, however, relate solely to municipal affairs.

It only remains to consider whether the regulation of rates of a gas company doing business wholly within a municipality and engaged solely in supplying its inhabitants with heat and light, is the exercise of the police power of the municipality. It is settled by a long line of authorities that the regulation of rates to be charged by a public service corporation comes within the exercise of the police power.

Munn v. *Illinois*, 4 Otto, 113-125.
Farwell v. *City of Chicago*, 71 Ill., 269.
City of Chicago v. *Rogers Park Water Co.*, 214 Ill., 212-23.
Cooley on Constitutional Limitations, 2nd Ed., pp. 734 and 735.

In *Munn* v. *Illinois*, 94 U. S., 125, this court said, in speaking of the police powers of the government:

> "Under these powers the government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold."

The Supreme Court of Illinois said, in *Farwell* v. *City of Chicago*, 71 Ill., 269, in speaking of an ordinance

which prescribed the maximum rates to be charged by hackmen and draymen, page 272:

> "The spirit of the ordinance is, to bring the class of carriers therein named under the police regulations of the city. It is designed to operate upon those who hold themselves out as common carriers in the city for hire, and to so regulate them as to prevent extortion, imposition and wrong to strangers and others compelled to employ them, in having their property or persons carried from one part of the city to another. This is a rightful exercise of the police power. (Cooley Const. Lim., 201.)"

Again, in *City of Chicago* v. *Rogers Park Water Co.*, 214 Ill., 212-223, the court said, in referring to an ordinance regulating the price of water, page 223:

> "In the exercise of the police power the state may require that the individual so manage and control his own property that the public health, public peace and public welfare may be conserved. Usually, the police power is invoked to restrict the owner in those uses of his property which he might have as a matter of natural right, so as to conform to the welfare of established society. It is said to be founded on two maxims: First, 'So use your own property as not to injure others;' and second, 'The safety of the people is the supreme law.' (22 Am. & Eng. Ency. of Law, 2d Ed., pp. 916-918.)"

It thus appears that under the settled decisions of the Supreme Court of Illinois, the right to regulate the maximum charges of a public service corporation is the exercise of the police power of the government. If a corporation is engaged in state commerce or in a calling wherein it deals with the people of the state at large, the right to regulate charges is the exercise of the police

power of the state. Where, however, a public service corporation, like a gas company, is given the right to do business solely within a municipality and upon the express condition that it may erect its factory and lay down its pipes and mains, subject to such regulations as the city council may by ordinance prescribe, it is plain that the right to regulate the price to be charged by such a public service corporation is the exercise of the police power of the municipality within which it transacts its business.

In *City of Chicago* v. *Gunning System*, 214 Ill., 628, the court said, in speaking of the police powers of the state that were delegated to the City of Chicago under the authority "to pass and enforce all necessary police ordinances," that it was "that inherent or plenary power which enables the state to prohibit all things hurtful to the comfort, safety and welfare of society, and may be termed the law of overruling necessity."

It is a familiar rule of law that a public service corporation must serve all persons upon equal terms. In other words, that it has no right to discriminate against individuals in the same conditions and circumstances. For instance, could the appellant Gas Company charge within the City of Peoria 75 cents per thousand cubic feet from some of its customers and exact the sum of $1.00 per thousand cubic feet from others? Suppose the appellant Gas Company should attempt to do so. Would the City of Peoria have the right to pass an ordinance and to prescribe a penalty for its violation, requiring the appellant company to deliver gas to all of its inhabitants upon terms of equality? That such a power would exist on the part of the City of Peoria we believe is unquestioned. That such a power would be the exercise of

precisely the same kind of a police power as that prescribing a maximum rate is equally unquestioned. That both of the above powers could be exercised by the municipality under the general police power of the state, delegated by it to municipal corporations under Subdivision 66 of Section 1, Article V, would follow as a necessary corollary. Or to put the question a little differently: Should the municipality pass an ordinance requiring gas to be delivered to every consumer at the same rate and prescribing a penalty for its violation, and suppose that the corporation refused altogether to deliver gas to some of its consumers, would it be seriously contended that the right to compel the delivery of gas to every consumer at the same rate, would be beyond the police power of the municipality? Or could the Gas Company withdraw its service arbitrarily and at its will from any or all of the inhabitants of the city without being subjected to municipal regulation? The supply at reasonable rates and upon terms of equality to all the inhabitants within a municipality, of gas for heating and lighting purposes is certainly a regulation that is necessary for the preservation of the health, safety and the general welfare of its inhabitants. To contend that a corporation, having obtained the right to erect its factory and lay down its mains, subject to municipal regulation, may demand a price so exorbitant that no consumer can pay it, and thus leave the inhabitants of the city in darkness and without fuel, is to argue that a municipality would be powerless to enact reasonable regulations for the preservation of the health, comfort and welfare of its inhabitants.

The cases cited by counsel for Mr. Mills from the Supreme Court of Illinois are not in any way inconsistent with the views above expressed. In the case of *Wilke* v.

City of Chicago, 188 Ill., 444, relied upon by counsel, the city passed an ordinance requiring each master plumber to pay a license fee of $30 per year and imposing a penalty for a violation of said ordinance. The court held that the ordinance in question was not the exercise of any police power of a municipality for it had no tendency to promote the health, comfort or welfare of its inhabitants, but amounted merely to taxing every person pursuing that calling, the sum of $30.

The ordinance did not aim at suppressing extortion or at regulating the manner and method of doing work within the municipality, but merely demanded point blank a certain sum of money. It is plain that the question there under consideration was profoundly different from the one now before the court.

The case of *Wice* v. *C. & N. W. Ry. Co.*, 193 Ill., 351, was an ordinance forbidding passengers from getting on or off trains while they were in motion unless permitted by those in charge and prescribing penalties for its violation.

The court denied the power of the City of Chicago to pass the above ordinance, not because the authority to do so was a state, as distinguished from a municipal power, but the power was denied solely because the ordinance had no tendency to promote the safety, welfare or health of the inhabitants of the city. The court there said:

> "It is difficult to conceive of the necessity, as a police regulation, for such an ordinance and it is only necessary police ordinances that the city is authorized to pass."

Counsel says in reference to this case that no one would doubt that the making of such a law was "within the police power of the legislature." That is counsel's per-

On September 18, 1900, the plaintiff filed this bill of complaint, setting forth its organization, the ordinance under which it was given authority to occupy certain streets and that of September 4, 1900; alleged that the latter ordinance was invalid as establishing a rate which was not renumerative and in effect confiscatory, and was thus taking private property for public use without just compensation and depriving the plaintiff of its property without due process of law. The city answered, narrating the circumstances attending the organization of the plaintiff and the passage of the ordinance authorizing it to occupy the streets and supply the city with gas, with the representation made at the time, and claimed an estoppel by reason thereof, showing also the rates which had been the result of competition, the raise in price by the two companies, charged that this was by agreement between the companies, alleged that the ordinance of September 4 was passed in good faith and to prevent extortion by the companies, and also that the rate fixed was reasonable. While the answer alleged that the fixing of the rates from the first of August was by agreement between the two corporations, it did not, in terms, plead that the agreement was in violation of any particular statute.

By consent a special commissioner was appointed to take the proofs and report the same with his findings and conclusions thereon. He took an enormous amount of testimony, the printed record in this court amounting to 1,780 pages. From it he found and reported that the rate prescribed by the ordinance of September 4 did not furnish compensation, was confiscatory in its effect, and therefore unreasonable. Exceptions were taken by both sides to different portions of his findings and conclusions of law. On a hearing before the Circuit Court the question of the reasonableness of the rates prescribed was ignored, the court found that the increase in rates on August 1, 1900, was the result of an illegal combination between the two gas companies and in violation of the Illinois anti-trust law of 1891, that, therefore, the plaintiff was not entitled to any relief against the ordinance of September 4, and entered a decree dismissing the bill.

The anti-trust act of Illinois, approved June 11, 1891, (Laws 1891, p. 206,) forbids the entering into any "pool, trust, agreement, combination, confederation or understanding . . . to regulate or fix the price of any article of merchandise or commodity," and punishes the same by fine. Sections 5 and 6 are as follows:

"5. Any contract or agreement in violation of any provision of the preceding sections of this act shall be absolutely void.

"6. Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment."

Subsequently and in 1893 another act was passed, which was held by this court in *Connolly* v. *Sewer Pipe Company*, 184 U. S. 540, to constitute class legislation, and to be void. An amendment in 1897 to the act of 1891 was subject to the same objection. The Supreme Court of Illinois has since held that the act of 1891 was not repealed by the act of 1893 or the amendment of 1897, and is still in force. *The People ex rel.* v. *Butler Street Foundry*, 201 Ill. 236, 257; *Chicago, Wilmington & Vermilion Coal Co.* v. *The People*, 214 Ill. 421, 454.

Mr. Justice BREWER delivered the opinion of the Court.

This case was tried on one theory and decided on another. While that does not always and necessarily constitute error, yet, under the circumstances, as disclosed by the record, we are of opinion that injustice has probably resulted and that there should be a reversal of the decree and a further examination in the Circuit Court. As stated in the findings of the commissioner, the bill proceeds upon the theory that the ordinance of September 4, 1900, impaired the rights of contract theretofore existing between the parties, that its enforcement would constitute the taking of private property for public use without just compensation, that the penalties prescribed for a violation of the ordinance were exorbitant and not sanctioned by the laws of the State of Illinois, while the answer justified the provisions of the ordinance by the statements and representations made by the stockholders in the company to the city council at the time the plaintiff's franchise was sought, and alleged that the rate therein fixed was reasonable. On these questions the stress of the controversy was rested. The court entirely ignored them and placed its decision on the single ground that the two companies had by agreement attempted to fix their prices, and therefore came within the scope of the Illinois anti-trust law—an act which had not been in terms referred to either in the pleadings or the report of the master.

There was no positive evidence and no finding by the commissioner of an agreement between the two companies, and while from their action an inference might be drawn that they had entered into some agreement in respect to rates on August 1, 1900, neither its terms, scope nor duration were shown. It also appears from the testimony that that rate was continued by the old company only until January 1, 1901, when an even rate of one dollar per thousand was established, and that this latter rate was on September 1, 1901, also established by the new company, the plaintiff herein. Whether this action of the new company in adopting the rate which had been kept in force by the old company since January 1, 1901, was the result of agreement or an independent act on its part is not shown. It appears further that in October, 1901, the plaintiff entered into

a contract with the old company to supply it with gas for the use of its customers and that, the latter company desisting temporarily from manufacture, this contract continued in force until August 19, 1902, but this was found by the commissioner to have been a purely private business arrangement between the companies and without relation to the charges made by either to its customers. Doubtless it, together with the evidence of changes in holding of stock, tended to show at least a cessation of competition between the two companies, if not of a unity of control or agreement between them.

We shall assume that there was testimony from which the court justly found that the rates announced on August 1 were fixed by an agreement between the two companies. We shall also assume, though without deciding, that while that agreement was in force and the parties were acting under it, neither could recover for the gas that it furnished, nor could this plaintiff question the validity of the ordinance of September 4. But although the stringent provisions of the Illinois anti-trust law may apply to the case of an agreement between two gas companies fixing the price of gas, and even if while the parties are proceeding under it any party receiving gas may avoid payment therefor on that ground, and the city likewise be upheld in an ordinance establishing maximum rates which are not remunerative, yet the making of such an agreement does not subject the companies to a perpetual penalty. Parties making an agreement, unlawful by the anti-trust act, may while the agreement is in force be subject to its penalties, but whenever they cease to act under it the penalties also cease. The punishment adheres to the offense and stops when the offense itself stops. Now it is in evidence that the prices were changed by the old company on the 1st of January, 1901—five months after the alleged agreement for a uniform rate—and that for months thereafter each company was charging a different rate, but the decree was one of absolute dismissal—an adjudication that the ordinance of September 4 was valid, an adjudication which became *res judicata* for all future litigation, and this in the face of the finding by the commissioner, undisturbed by the court, that the rates established by it are not remunerative, and thus work a gradual confiscation of the property belonging to the plaintiff.

We think that under the circumstances the decree should be reversed and the case remanded with instructions either to refer it to a commissioner for further findings, with leave to take additional testimony if that be deemed necessary, showing the terms and duration of the alleged agreement between the two companies, and how far it was acted upon by them, or that the court should itself undertake this investigation and make like findings.

The decree of the Circuit Court is

Reversed.